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Music, Money, and the MIDDLEMAN

Afternoon has struck Nashville, Tennessee. The sound of guitar chords and a woman's melodious lilt mix with ringing telephones and staccato computer typing in a brick building off Music Row. Carnival Publishing, a small, independent music publisher, occupies part of the first floor. Its songwriters jam amidst candles and beaten couches, trying to find the unique sound that will launch careers and reputations. After all, they think, Randy Travis or LeAnn Rimes may select one of these songs for their next album. Propped against the window, sunlight filters across a picture of one such songwriter in a dreamy moment of inspiration. Her name is Carter Wood.



Cornelius Cowles

THE RELATIONSHIP BETWEEN THE SONGWRITER AND THE PUBLISHER

By Cornelius Cowles

When she graduated from college six years ago, Carter came to Nashville hoping to learn about the music industry. She had never written a song before and had virtually no exposure to the bustling industry that prompts Nashville to call itself Music City, USA. An internship at a record label convinced her that songwriting could be her secret strength. She didn't know then that to sign her first publishing contract would demand five years of dedication, self-promotion, and self-discipline.

Though Carter stayed, and succeeded, these sacrifices have stilled the aspirations of countless others. Songwriting in Nashville is rarely a "get-rich-quick" story. Rather, it is a work in progress—a journey of paying dues, making connections, and avoiding legal pitfalls. Consider: a song request from a star like George Strait would garner thousands of submissions. From these, Strait would choose approximately 70 songs, which in turn would be held for only 10 spots on an album. The numbers are crushing, so any competitive edge in the industry brings a writer that much closer to Music Row.¹ Their success is a recipe of talent, timing, and connections, but the songwriter controls only the first. At least in the beginning of a writer's career, and for Carter Wood, the music publisher provides the timing and connections.

Carter acknowledges as much: "It's all about who the contacts are, and which plug-

ger [publisher who promotes its writers' songs] has the contacts."² In addition, the songwriter must be persistent in nurturing her own contacts. Carter, through such initiative, ended up touring with Willie Nelson this past summer.

Like many other writers in Nashville, however, Carter "hates the business side of the industry."³ When signing her contract with Carnival, Carter let her lawyer negotiate the details with her publisher, Travis Hill, and his lawyers. As is true for most songwriters, the fine print of her contract seems far removed from the notes Carter writes across a music staff. But the two are inextricably linked.

While it is advisable to hire a lawyer for such details, it is also prudent to know what exactly the lawyers are negotiating. Knowing basic music industry contract standards helps the writer guide his or her attorney to secure the most highly valued elements and avoid future surprises. At the very least, and most importantly, knowledge of legal details lets the writer protect her interests in her songs. These interests, or the "writer's rights," demark the bottom line in this and all other industries: money.

Money, along with creative drive and the chance to work in an exciting industry, push the publisher and songwriter both. This article seeks to help the songwriter understand the role of the music publisher, an indispensable and unavoidable part of the

country music industry. It examines the songwriter-publisher relationship from the perspective of those people active in the industry and examines criticism of the publisher's role. It further analyzes the typically thorny legal and contractual issues faced by the songwriter in negotiating an exclusive songwriting agreement with the publisher. Finally, recognizing the special role of songwriters in Nashville, it addresses the songwriter-publisher relationship as it uniquely exists in Nashville, home of country music.

The Role of the Music Publisher

The music publisher derives income from a song once the writer has transferred his or her rights to the publisher. Some songwriters are suspicious of this arrangement and question the publisher's substantial claim on song income. For the aspiring songwriter, though, the commission is well-spent. No matter what criticism publishers face, songwriters need publishers. The publisher acts as the crucial link in transforming the songwriter's creative work into a marketable product.

The publisher introduces the songwriter to artists and producers, finds a good fit between song and artist, provides a disciplined working environment, oversees the business aspects of song promotion, and advances money to the writer. In short, absent the music publisher, the unknown songwriter has no

conduit through which to channel the song over the airwaves and into the record stores. The publisher extracts a heavy price for this service, typically leaving the songwriter with less than 50 percent of a song's income. Yet, in most cases, there would be no income to extract without the publisher.

The most common criticism levied against publishers concerns the publisher's 50 percent draw of income. In other industries, such as film and television, certain states have enacted statutes to limit the fees of managers and agents. Agents solely attempt to secure work for clients, while managers take a more proactive role in developing artists' careers.⁴ Managers also advise clients on public appearances, promotion, and choice of material.⁵

California's Talent Agencies Act requires agents to register their fees with the state, who, in turn, may invalidate "unfair, unjust and oppressive" contracts.⁶ The state normally invokes this language when contracts set agency fees above ten percent.⁷ Managers may charge somewhere between 15-25 percent.⁸ New York's General Business Law, for example, sets agent's fees at 10 percent.⁹ An actor in California accustomed to paying the agent a low percentage might be shocked at paying a publisher in Nashville 50 percent.

But country music differs sharply from television and film. These differences justi-

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fy publishers' greater claim to song income. To begin with, agents normally represent many more people than publishers, so they can earn more income overall at a lower percentage.¹⁰ Clients only require agents to find suitable work opportunities. Publishers, like managers, engage in more "hand-holding" than agents. Still, this would seem to limit publishing fees to a manager's range of 15-25 percent.

Publishers, however, go well beyond even managers. They coach writers in the right creative direction, promote songs, and, instead of seeking work opportunities for writers, *provide writers with work themselves*. Unlike both agents and managers, publishers actually pay writers a salary in the form of advances. Even if a writer's songs earn nothing, the writer still keeps the whole amount.

In addition, the TV/film industry generates much more money than country music.¹¹ Agents happily collect ten percent of a million-dollar film contract but even classic, hit songs rarely earn this kind of money. Agents can recover costs quickly in the high margin industry. Publishers recoup their costs more slowly, if at all.

Another criticism charged against publishers involves writers' loss of creative control. An unknown writer lacks the bargaining power to assure her songs will be used in ways she finds acceptable. To earn money, an unscrupulous publisher might sell the

song as background music for an X-rated film, for example, or to promote a product or message the writer would find distasteful.

In reality, most publishers understand that such uses run contrary to good business sense. Publishers want to preserve and enhance their reputations to attract more writing talent and to maintain that talent already under contract. Publishers who engage in such bad business practices do not advance far in the small world of Nashville's country music industry. In the rare cases of exploitation, though, the songwriter should know how to make herself legally secure in this competitive industry. That means understanding the publisher's role and the songwriter's rights in country music.

Contrary to what the name would suggest, music publishers rarely "publish" anything.¹² Publishing print copies of music, or sheet music, is normally left to printers.¹³ Music publishers, instead, deal in the rights to original music by obtaining copyrights on it and then licensing out lesser rights to other entities.¹⁴ These entities include record companies who produce cassettes and compact discs for retail and performing rights societies which act as central clearing houses so broadcasters and other public performers can simply and efficiently obtain performance licenses.¹⁵

The word "copyright" means the statutory rights given to a writer to protect

his or her original works.¹⁶ "It includes the exclusive right to make and publish copies of the copyrighted work, to make other versions of the work, [t]o make recordings of the work and to perform the work in public."¹⁷ The 1976 Copyright Act currently governs copyright law in America.¹⁸ Once the music publisher owns the copyright of a song, the publisher can control all aspects of how that song is reproduced and made available to others.¹⁹ With more songs under control, the publisher has better odds that one of those songs will become a hit. Some large publishing companies have "catalogs" of more than 500,000 copyrights.²⁰ Administering the copyright, and collecting fees based on the license of the copyright, provides the bulk of a publisher's income.²¹

In the pop field, songwriter-artists frequently form their own publishing companies. Country, however, diverges from straight rock-and-roll. Fred Kewley, an agent and manager who has managed such stars as Harry Chapin and Chet Atkins, observes: "Publishing in Nashville is different than in New York or Los Angeles; publishing is different with country than pop."²² Nashville, and the country music genre in general, employs more songwriters than anywhere else. Mike Doyle, an executive with the performing rights society ASCAP, reiterates this view: "In Nashville, beyond a doubt, songwriting is held up

in a different regard [than in New York or Los Angeles] because country music is a lyrically-based format that concentrates on storytelling more than pop."²³ Only a talented songwriter can deliver the story country fans expect. Doyle continues: "More so than pop and urban, country is driven by songwriters who do nothing but write songs to be pitched to artists."²⁴

In fact, Donald Biederman, general counsel for Warner/Chappell Music, goes even farther than Doyle. Outside of country, he says, "it's an artist-writer world."²⁵ "If you have a pure songwriter," he points out, "for that writer to be successful, [it will happen] *only in Nashville*."²⁶ Because the "pure songwriter" rarely has the personal network necessary to pitch his or her songs, the music publisher steps in to match the song to the "right" artist.

In Nashville, an unknown songwriter seldom gets a song included on an album without the help of a publisher.²⁷ As Carter Wood has learned in her dealings with Carnival, publishers provide a far-reaching network of contacts with artists, recording companies, performing rights societies, movie and television producers, printers, and foreign subpublishers.²⁸

But the music publisher offers more than just contacts. The publisher also has the financial resources to jump-start a songwriter's career. Kewley explains: "For the songwriter who also aspires to be an artist, the publisher often serves as the

backbone of the person's career. If the publisher likes the songwriter's stuff, the publisher may help him (or her) develop into an artist."²⁹ Thus, the publisher can help turn a pure songwriter into a songwriter-artist.

It is helpful to conceive of the music publisher as a middle-man. The songwriter creates a composition. But for the songwriter to receive income from this creative process, something, or someone, must bridge the gap from songwriter to income source. The music publisher acts as this bridge. Mechanical royalties and public performance royalties provide the main source of such income for the publisher and songwriter alike.³⁰ After obtaining the rights to the songwriter's song, the publisher can proceed to exploit it by granting the mechanical license to record companies and the public performance license to the performing rights societies.³¹

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Of course, the publisher must first obtain the songwriter's copyright. As a leading legal text explains, "[t]he songwriter creates the very product on which the industry is based, the words and music. In accordance with the 1976 Copyright Act, the ownership of the copyright of that musical composition vests in the songwriter at the moment of its creation if it is fixed in a tangible instrument of expression."³² While the copyright immediately vests in the songwriter, money pursuant to that copyright does not. And songwrit-

ers, like anyone else, must eat. Thus, as Fred Kewley observes: "People give away copyrights forever in order to eat now."³³ They do so by means of the songwriter-publisher agreement, the contract that represents the business bottom line that Carter and other writers would happily forget.

From Singing to Signing

The songwriter-publisher agreement sets out the grant or transfer of rights from songwriter to publisher.³⁴ (An example of the transfer of rights in an exclusive songwriter agreement can be found in Appendix A). This grant of rights brings with it the power to exploit the song.

Carter Wood's contract with Carnival Publishing is an exclusive songwriting agreement. An "exclusive" songwriting contract simply connotes that the songwriter is contracting with only one publisher and is not assigning any rights to other publishers, such as in a "co-publishing" agreement.³⁵ Although the 1976 Copyright Act allows the different "rights" in a composition to be divided, most beginning songwriters do not have the bargaining strength to contract for anything but an exclusive songwriter agreement.³⁶ In many instances, the exclusive songwriter agreement is simpler than any alternative arrangement, providing the fledgling songwriter efficient administration of the song, exploitation/promotion, and collection of fees all at once.

The sample songwriter-publisher contract in Appendix A sets out in detail the rights that the songwriter actually gives away. In general, the songwriter's transfer of the copyright includes the composition's title, words, and music.³⁷ The transfer is valid as against subsequent claimants throughout the world. By transferring the "exclusive rights in and to all copyrights therein for the universe," the songwriter relinquishes worldwide control of the copyright to the publisher. Thus, the songwriter cannot, for example, bypass her domestic publisher and contract with a European publisher for overseas distribution. Once the songwriter transfers the copyright, the publisher can proceed to issue lesser rights in the song. These rights are subordinate to the greater copyright held by the publisher.

Public Performance Rights

Transferring the copyright allows the publisher to license to others the right to perform the composition. (See Appendix A, clause (b)(i)). This license allows any radio, television, or other media form to play the song for any program.³⁸ In all likelihood, the songwriter supports this transaction because it means wider exposure for the writer's songs.

While an exclusive songwriting contract normally permits the publisher to license the song for public and private performance, it does not *require* such licens-

ing. Yet the songwriter expects the publisher to exploit and promote the song. Accordingly, the songwriter should request a clause requiring the publisher to use best efforts in exploiting the song. (See Appendix B for sample).

The publisher does not directly grant a performance license to radio and television stations. Rather, the publisher gives a performing rights society a non-exclusive license.³⁹ The performing rights society then, in turn, provides radio and television stations with a "blanket" license to perform any of the songs registered with the performing rights society.⁴⁰ The society roughly tracks how often a given song was broadcast and then collects performance royalties from the medium.⁴¹ After deducting for administrative overhead, the society then pays these royalties in part to the publisher and in part to the songwriter.⁴² The publisher and songwriter typically halve this amount.⁴³ The societies do not pay one lump-sum to publishers, letting them carve out the songwriter's share. Rather, the performing rights society pays the songwriter his or her share directly.⁴⁴ Since this is industry-standard, most publishers will specify in a contract that they have no responsibility to pay the songwriter public performance royalties. (See Appendix C). Such provisions operate in the songwriter's favor and seemingly argue against the need for a publisher. The publisher, however, remains

crucial for other reasons related to networking and song promotion.

The three major performing rights societies in America are the American Society of Composers, Authors and Performers (ASCAP), Broadcast Music Inc. (BMI), and the Society of European Stage Authors and Composers (SESAC).⁴⁵ Sometimes publishers are already affiliated with one of these and the writer must follow the publisher's lead by affiliating with the same society.⁴⁶ In other cases, the writer has already joined one of the performing rights societies, and so must choose a publisher who is registered with that same society. While publishers may contract with different performing rights societies for different writers, they may only contract with one society per writer.⁴⁷

Each society has its own method of tracking royalties.⁴⁸ Mike Doyle, an executive with ASCAP, explains that "16 cents of every dollar that ASCAP collects goes back into ASCAP for overhead. In 1997, ASCAP distributed to its members approximately \$420 million out of \$460 million collected."⁴⁹ Doyle notes

how rarely songwriters can make it without a publisher's assistance by relying solely on performance royalties. "It's the successful writer, with top ten and top 20 singles [who] can survive without publishing. Most people come up through the ranks and get paid through the lean years by the publishing company. ASCAP has 75,000 members. Less than three percent make more than \$20,000 a year from the fees ASCAP pays. Most people cannot survive on this, and so need the publishing deal."⁵⁰

The "deal" Doyle refers to describes the grant of rights from songwriter to publisher.⁵¹ In return, the publisher advances money to the songwriter against future income the song might produce.⁵² There is always the chance that the publisher will be unsuccessful in exploiting the song and not recoup these advances. The publisher thus risks money on every writer. However, there is also the chance that the writer's songs will become national hits, producing much more income than the advances provided for in the exclusive songwriting agreement. In that case, both parties benefit

by receiving increasing shares of performance royalties and mechanical rights royalties, as will be discussed later.

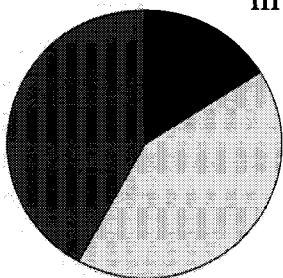
If a classic, hit song produces \$500,000 in public performance royalties, for example, a performing rights society like ASCAP immediately takes \$80,000 off the top, or 16 percent.⁵³ The remaining \$420,000 is then divided fifty-fifty between the music publisher and the songwriter.⁵⁴ This leaves the songwriter with \$210,000 from the original \$500,000, or only 42 percent of what the song actually earned from public performances. While this percentage seems discouraging to the songwriter, the song probably would have earned no money without the services of the "middleman."

Creative Rights

The publisher also frequently receives the right to change the title, lyrics, or music of the song that is the writer's creation (See Appendix A, clause (b)(ii)). The publisher requires flexibility in marketing the song, and, in order to make it more marketable, the publisher may have to change something.⁵⁵ Changes are rarely wholesale, but any change still departs from the writer's original concept. If the publisher expects to market the song in a non-English speaking country, the contract must also transfer control over the translation of the lyrics.⁵⁶

To preserve some creative control, a writer should require that the publisher seek prior approval for any

Hit song's net worth: \$500,000 in public performance royalties



- Songwriter's Share = \$210,000
- Publisher's Fee = \$210,000
- Performing Rights Society's Fee = \$80,000

changes. At the very least, the writer should expect notification from the publisher of proposed changes. The publisher, on the other hand, may only agree to such a provision if the writer guarantees not to “unreasonably” withhold approval. Defining what is “reasonable” will be difficult as each writer likely has his or her own particular quirks and sensitivities. If the writer has any negotiating leverage, a clause that simply requires the writer’s approval, whether reasonable or unreasonable, is most favorable.

A standard exclusive songwriting agreement will also allow the publisher the option of registering the copyright, renewing it, or extending it.⁵⁷ (See Appendix A, clause (b)(iii).) While this right to register is at the publisher’s election, it is in the publisher’s interest to do so. Registering the copyright protects against any future litigation that might threaten the publisher’s income from the song.

Mechanical & Synchronization Rights

Every songwriter-publisher contract will have a clause relating to the mechanical rights of the composition. (See Appendix A, clause (b)(iv)). The copyright owner holds the exclusive right to reproduce the song in copies on records, cassette tapes, and compact discs.⁵⁸ Normally, however, the music publisher issues this right to someone else. When the owner of the copyright grants to someone this right to reproduction, it is called a mechanical license.⁵⁹

For the
songwriter to
receive
income from
this creative
process,
something, or
someone,
must bridge
the gap from
songwriter
to income
source.
The music
publisher
acts as this
bridge.

By transferring the copyright, the songwriter also transfers the mechanical right. (See Appendix A, clause (b)(iv)). This transfer allows the publisher to exploit the mechanical right by issuing mechanical licenses.⁶⁰ Before a record company like Capitol or MCA can reproduce a song for retail, it must obtain a mechanical license from the copyright owner. “This type of license is limited to those who intend to make these recordings available only for *private* use – the kind of recordings [consumers] buy and take home.”⁶¹

The mechanical license for such private use differs from synchronization rights and the synchronization license. This latter set of rights concerns the “right to reproduce the music onto the soundtrack of a film or videotape in synchronization with the action.”⁶² Like the mechanical right, it also belongs exclusively to the copyright owner.⁶³ Producers of music videos for MTV or VH-1 must obtain synchronization licenses for any songs they use, as must television or film producers.⁶⁴

Mechanical and synchronization rights clauses should require a writer’s prior approval for some uses. Though as copyright owner the publisher has total control over the licensing of mechanical and synchronization rights, the publishers invite ill will if they ignore a writer’s wishes for certain uses. These uses include commercials, NC-17 films, film opening or end-credits,

or political and religious causes. (See Appendix A, clause (b)(iv)).

The songwriter should also seek prior approval for mechanical licenses contracted at less than 75 percent of statutorily-prescribed rates. (See Appendix A, clause (b)(iv)). Such low rates increase profitability to the record producer at the expense of both the publisher and songwriter.⁶⁵ These “below-rate” licenses are attractive to record companies and makes them more willing to produce a song.

The current statutory royalty rate is seven cents per song, meaning mechanical licensees pay this sum to the publisher per each recording of a song.⁶⁶ Every song recorded on every album distributed counts. If a song is recorded a million times, for example, the mechanical licensee must pay \$70,000.

Unlike public performance royalties, music publishers must both collect and administer mechanical and synchronization royalties, and then divide out the songwriter’s share. The performing rights societies, in contrast, directly pay the songwriter public performance royalties, separately from the publisher. Along with public performance royalties, mechanical and synchronization royalties comprise nearly all of a music publisher’s income.⁶⁷

Many publishers use the Harry Fox Agency for collection and administration of mechanical royalties.⁶⁸ This agency is affiliated with the National Music Publishers

Association and represents thousands of music publishers.⁶⁹ It negotiates mechanical licenses on behalf of publishers, collects mechanical royalties from record companies, and distributes those royalties back to the publishers.⁷⁰ For this, the Harry Fox Agency claims approximately four percent from the collections owed to the publisher.⁷¹

When publishers use this service, a second middle-man appears between the songwriter and the income source. The mechanical royalties from the recording companies must now pass first through the Harry Fox Agency and then through the music publisher before reaching the songwriter. If a classic, hit song earns \$500,000 in mechanical royalties, the Harry Fox Agency takes its four percent share of \$20,000. This leaves \$480,000. After the music publisher takes the standard one-half, the songwriter is left with \$240,000, or 48 percent of the song's total \$500,000 mechanical royalty income.

Assignment of Rights

The songwriter should be aware of the legal effect of an assignment of rights. Generally, an overall transfer of rights will extend to the publisher's successors, whomever they may be. (See Appendix E). The publisher may have the power to assign these contract rights to any successor, affiliate, or purchaser.⁷² Among others, these rights include the mechanical and synchronization rights, the public per-

forming rights, and the right to change the song. Yet the publisher, in turn, will often forbid the songwriter from assigning his or her obligations under the contract to someone else.

This prohibition protects the publisher, who chose and developed the songwriter's unique abilities and reputation. But the songwriter, who likewise may have selected a publisher for his or her unique reputation and abilities, could end up working with an incompetent or disagreeable publisher through assignment. If, for example, a different company acquired Carnival, and Carter remained under contract, her working environment and career opportunities could significantly diminish.

Unlike so many music industry issues that are resolved informally or through negotiation, contract assignment has tangled parties in litigation. In Linzer v. EMI Blackwood Music, Inc., the Four Seasons' publisher assigned its rights to some of the group's songs to EMI, a larger publishing group.⁷³ Because of a contract ambiguity, this assignment precipitated litigation over whether the Four Seasons or EMI controlled the renewal rights of the songs.⁷⁴ It is thus in the songwriter's interest to allow for contract assignment only when the new party closely resembles the original publisher in reputation and ability.

Sheet Music and Print Publication Rights

Most exclusive songwriter agreements will include the

music publisher's right to print, publish, and sell various print versions of the songwriter's song. (See Appendix A, clause (b)(v)).⁷⁵ These versions include sheet music, orchestrations, and other arrangements. The publisher rarely prints the song itself. Rather, it licenses others with this right.⁷⁶ Royalties from printed editions of songs form a tiny percentage of the total income a publisher receives.⁷⁷

If the print publication clause does not require writer approval, the publisher can put the song in any compilation book with any other songwriter's songs, in any theme book or other printed version. If a song-

The Top Reasons Why Songwriters Enter Publishing Deals

To get money **1** up-front in order to live today

To get a **2** record deal

To administer the **3** business aspects of song promotion and fee collection

To have the external discipline of working under contract and with other songwriters in order to create songs **4**

Source: Malcolm L. Mimms, Jr.,
entertainment attorney in Nashville, TN

writer is particularly sensitive about how the song is published, or has sufficient bargaining power, he or she may want to insist on prior approval in this area. On the other hand, approval over the synchronization rights and the use of the song in commercials, movies, and for political or religious causes is likely of more importance to the songwriter. Generally, a new songwriter will only have so much bargaining strength and must ration it carefully.

Compensation

In return for the grant of these many rights to the music publisher, the songwriter receives some combination of the various royalties, in addition to monthly or weekly advances.⁷⁸ For the songwriter in the early lean years, receiving upfront compensation is the primary motivation to enter an exclusive songwriting agreement. Carter was relieved to sign a publishing agreement after going it alone for several years. "It's great to get paid to write songs," she says.⁷⁹ In addition to advances from the publisher, the songwriter will immediately earn money from performance rights, if the song is successful.⁸⁰ This follows from the performing rights societies' method of directly paying the writer.

It will be a while, however, before the writer earns any other royalties. In most cases, the music publisher must first recoup all of the advance money already extended. This money most-

“People give
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ly comes from the mechanical royalties, but whatever synchronization or print royalties exist are also subject to recapture. The publisher will also deduct between 50 to 100 percent of any expenses made on behalf of the songwriter for demonstration tapes.⁸¹ This includes paying a band to play the song for the “demo” tape if the songwriter is not a skilled performer.

Only after the publisher has recouped the advance money and demonstration costs will the songwriter begin receiving his or her share of the royalties. After administrative fees and the publisher's percentage, this share is almost always less than 50 percent of the total income the song has produced. Manager Fred Kewley asserts, however, that if the publisher has advanced money every year and exploited personal contacts to promote the song, “the publisher has earned its share.”⁸²

In rare instances, a publisher, like Hipp Row Publishing in Nashville, will provide for “non-recoupable advances.” In this arrangement, the writer immediately begins receiving her share from whatever income the song produces, rather than having to repay the advances. This method is not the norm, however, and is often limited to single-song-writing agreements.

Carter describes the process of waiting for the song to earn income as one of give and take: “You have to give up a little of yourself to establish yourself. If I write a

song and bring it to my publisher, the publisher may help as a sort-of coach or give you a support group to promote your name. But the songwriter must have self-discipline and make some of her own contacts, too.”⁸³ Carter's contract with Carnival, after five years of hard work, shows that such discipline pays off.

Some contend that a publisher who engages in little song promotion should not be entitled to receive the full 50 percent of the royalties, especially if the contracted songwriter succeeds by virtue of self-discipline and personal initiative.⁸⁴ But measuring who has contributed what and how much to the song pitch is difficult and divisive. If a songwriter is wary of publishing companies, she may try to pitch her songs herself. However, Carter explains that even the songwriter who manages to land her song on a record rarely earns more money than from a publishing deal. “If you pitch songs yourself, people may say they'll put it on their album, but to do so, they'll take [the equivalent] of the publishing share.”⁸⁵ Thus, while the amateur songwriter may have other good reasons to form her own publishing company, increased compensation is not guaranteed.

Another option for the beginning songwriter is the “single-song agreement.” With this agreement, the writer need only commit one song to the publisher.⁸⁶ It allows the writer to test his or her relationship with the

publisher, without significant obligations into an unforeseen future. The writer thus avoids signing away the copyrights to future songs. If the single contracted song leads to success, the writer, with greater bargaining power, can now negotiate a more favorable long-term contract. Because it deals with only one song, this arrangement decreases the odds that the writer will create a career-launching hit.

Once a songwriter has become established, there are many options for increasing the songwriter's share of the royalties. Forming one's own publishing company may prove most profitable because artists may desire the writer's songs on their albums.⁸⁷ Other methods of increasing the songwriter's share include the co-publishing agreement and the pure administration contract.⁸⁸

In the co-publishing agreement, the publisher and writer agree to share the publisher's royalties.⁸⁹ Usually the publisher only takes half of the normal 50 percent royalty take. The publisher is willing to do this with established writers.⁹⁰ This leaves the writer with close to 75 percent of the royalties.

The pure administration contract gives the writer even more royalties. Under such a contract, the publisher does not engage in any song promotion. The publisher instead merely renews the writer's copyright and collects royalties from the performing rights societies and the Harry Fox Agency.⁹¹

Despite the appeal of these alternatives, the exclusive agreement is still the best-suited for songwriters with little legal or industry experience. Its very simplicity defuses litigation. As Jim Harris, an entertainment attorney in Nashville, puts it, "there's very little that can go wrong."⁹² The basic contract, distilled from all of the rights already discussed, consists of the writer giving up her songs in exchange for royalties and advances. The publisher either pays the writer or does not. If the publisher fails to make payment, the songwriter can request an audit of the publisher to demonstrate that the publisher has received but not distributed the owed income. This usually forces the publisher to settle.⁹³ Very few singer-songwriter contract disputes ever advance to the courtroom.⁹⁴

If the publisher refuses to settle, however, the writer can request a court to issue a judgment for the amount owed. Several years ago, Jim Harris represented two songwriters in Nashville's Chancery Court. In an unreported case, the court found that the publisher had failed to account to the writers and that the publisher owed nearly \$28,000 in royalties. When the publisher still refused to pay after the court's decision, Harris took a sheriff and an empty truck to the publisher's office. They began to load the publisher's furniture, computer, and musical equipment into the truck. As Harris tells it, "that, surprisingly, immediately produced

our check."⁹⁵ Still, compensation disputes that reach the courtroom are rare. Everyone in the industry knows the rules already and respects them.

Between the Tin Pan Alley and the Top Ten Hit

For the songwriter to advance in Nashville, almost every industry insider recommends signing with a publisher. Don Biederman's first step would be to "get a lawyer or business manager who has an 'in' with the producers and big publishers."⁹⁶ Of course, each writer faces different circumstances and each must decide how best to proceed. If writers can sacrifice and self-promote, they should take the initiative. If not, the publisher is best positioned to market the song. The writer can then tailor the contract to his or her unique circumstances.

Songwriters enjoy many benefits by entering into publishing deals. However, publishers also approach songwriters for the potential economic benefits of someday hit songs. Mike Doyle of ASCAP describes the publisher's reasoning: "There's always talent. The publisher takes an economic risk on a writer in the early years in order to exploit the mature talents of the writer in the later years."⁹⁷ Brad Daniel, manager of Island Bound Music Publishing, states succinctly: "Publishers need writers to create and writers need publishers to plug. That's why the songwriter-publisher contract exists."⁹⁸

Agents, attorneys, song-

Generally,
a new
songwriter
will only have
so much
bargaining
strength and
must ration it
carefully.

writers, and industry executives all agree that Nashville is a publishing town. But competition is stiff among publishers, and writers may use this to their advantage. Doyle point out that "there are so many legitimate publishers in Nashville that, if a publisher is not treating a writer correctly, a writer can leave and go to another pub-

lisher."⁹⁹ At the very least, the writer's attorney can provide for an exit provision in the contract if the publisher does not meet certain performance standards. While legal and business hurdles do exist for the songwriter, Nashville clearly remains the songwriter's paradise. Carter recognized this when she came here and still does.

"I'm lucky to be here. Songwriting has been a fun and positive part of my life," she says.¹⁰⁰ As Mimms says: "Nashville is the last tin pan alley in the world. It's the only place with hundreds upon hundreds of songwriters all being paid weekly to pitch songs. There's no place else like this in the world."¹⁰¹ ♦

¹ Interview with Carter Wood, songwriter, in Nashville, Tenn. (Feb. 3, 1999).

² *Id.*

³ *Id.*

⁴ DONALD E. BIEDERMAN ET. AL, *THE LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRY* 233 (1996).

⁵ *Id.*

⁶ *Id.* at 236.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Interview with Mike Milom, entertainment attorney, in Nashville, Tenn. (Feb. 10, 1999).

¹¹ Interview with Brad Daniels, Island Bound Music Executive, in Nashville, Tenn. (Feb. 17, 1999).

¹² DAVID BASKERVILLE, *MUSIC BUSINESS HANDBOOK & CAREER GUIDE* 45 (6th ed., 1995).

¹³ *Id.*

¹⁴ JAY S. BOWEN & MALCOLM L. MIMMS, JR., *UNDERSTANDING THE LEGAL & BUSINESS ISSUES IN COUNTRY MUSIC* 303 (1997).

¹⁵ *Id.*

¹⁶ SIDNEY SHEMEL & M. WILLIAM KRASILOVSKY, *THIS BUSINESS OF MUSIC* (5th ed., 1985).

¹⁷ *Id.*

¹⁸ *Id.* at 129.

¹⁹ Telephone Interview with Fred Kewley, songwriter/artist manager (Oct. 12, 1998).

²⁰ BASKERVILLE, *supra* note 12, at 48.

²¹ Kewley, *supra* note 19.

²² *Id.*

²³ Telephone Interview with Mike Doyle, ASCAP Executive (Oct. 13,

1998).

²⁴ *Id.*

²⁵ Interview with Donald Biederman, General Counsel, Warner/Chappell (Jan. 22, 1999).

²⁶ *Id.*

²⁷ Kewley, *supra* note 19.

²⁸ BOWEN & MIMMS, *supra* note 14, at 303.

²⁹ Kewley, *supra* note 19.

³⁰ BASKERVILLE, *supra* note 12, at 45.

³¹ *See* BIEDERMAN, *supra* note 4, at 528.

³² PETER MULLER, *THE MUSIC BUSINESS: A LEGAL PERSPECTIVE* 27 (1994).

³³ Kewley, *supra* note 19.

³⁴ BOWEN & MIMMS, *supra* note 14, at 161.

³⁵ BASKERVILLE, *supra* note 12 at 70; BIEDERMAN, *supra* note 4, at 529.

³⁶ *See* BIEDERMAN, *supra* note 4, at 529; SHEMEL & KRASILOVSKY, *supra* note 16, at 171.

³⁷ MULLER, *supra* note 32, at 28.

³⁸ SHEMEL & KRASILOVSKY, *supra* note 16, at 178; BASKERVILLE, *supra* note 12, at 113-14.

³⁹ *Id.*

⁴⁰ *See* BASKERVILLE, *supra* note 12, at 111-14.

⁴¹ *See* BASKERVILLE, *supra* note 12, at 111-14; *see also* BIEDERMAN, *supra* note 4, at 526; Kewley, *supra* note 19.

⁴² BASKERVILLE, *supra* note 12, at 111-14; BIEDERMAN, *supra* note 4, at 528; Kewley, *supra* note 19.

⁴³ BIEDERMAN, *supra* note 4, at 528; Kewley, *supra* note 19.

⁴⁴ *See* MULLER, *supra* note 32, at 178.

⁴⁵ BASKERVILLE, *supra* note 12, at 115-124; BIEDERMAN, *supra* note 4, at 529.

- 46 Doyle, *supra* note 23.
- 47 Daniels, *supra* note 11.
- 48 See BASKERVILLE, *supra* note 12, at 115-24; SHEMEL & KRASILOVSKY, *supra* note 16, at 182-98.
- 49 Doyle, *supra* note 23.
- 50 *Id.*
- 51 Doyle, *supra* note 23; see also DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 215 (1994).
- 52 *Id.*
- 53 Doyle, *supra* note 23.
- 54 BIEDERMAN, *supra* note 4, at 528.
- 55 See MULLER, *supra* note 32, at 29.
- 56 See *id.*
- 57 *Id.* at 30.
- 58 SHEMEL & KRASILOVSKY, *supra* note 16 at 222.
- 59 See BASKERVILLE, *supra* note 12, at 125; PASSMAN, *supra* note 51, at 221.
- 60 *Id.*
- 61 BASKERVILLE, *supra* note 12, at 125.
- 62 Buffalo Broad. Co., Inc. v. American Soc'y of Composers, Authors and Publishers, 744 F.2d 917, 920 (2d Cir. 1984).
- 63 *Id.*
- 64 See BIEDERMAN, *supra* note 4, at 528.
- 65 See PASSMAN, *supra* note 51, at 221.
- 66 See BASKERVILLE, *supra* note 12, at 101, 125 (determined by Copyright Arbitration Royalty Panel under the 1976 Copyright Act); Doyle, *supra* note 23.
- 67 See PASSMAN, *supra* note 51, at 221; BASKERVILLE, *supra* note 12, at 74-75.
- 68 See PASSMAN, *supra* note 51, at 222; BASKERVILLE, *supra* note 12, at 125.
- 69 SHEMEL & KRASILOVSKY, *supra* note 16, at 227.
- 70 PASSMAN, *supra* note 51, at 222; SHEMEL & KRASILOVSKY, *supra* note 16, at 227.
- 71 BASKERVILLE, *supra* note 12, at 125; PASSMAN, *supra* note 51, at 222; SHEMEL & KRASILOVSKY, *supra* note 16, at 227.
- 72 MULLER, *supra* note 32, at 30.
- 73 Linzer v. EMI Blackwood Music, Inc., 904 F.Supp 207, 210-11 (S.D.N.Y. 1995).
- 74 *Id.*
- 75 See MULLER, *supra* note 32, at 30-31; PASSMAN, *supra* note 51, at 239-40.
- 76 See PASSMAN, *supra* note 51, at 239-40.
- 77 BIEDERMAN, *supra* note 4, at 528.
- 78 Kewley, *supra* note 19; Telephone Interview with Malcolm Mimms, entertainment attorney (Oct. 13, 1998).
- 79 Telephone Interview with Carter Wood, songwriter (Oct. 12, 1998).
- 80 PASSMAN, *supra* note 51, at 257.
- 81 Wood, *supra* note 79.
- 82 Kewley, *supra* note 19.
- 83 Wood, *supra* note 79.
- 84 Interview with Steven Lopez, Esquire Management, in Nashville, Tenn. (Feb. 1, 1999).
- 85 Wood, *supra* note 79.
- 86 See PASSMAN, *supra* note 51, at 260.
- 87 PASSMAN, *supra* note 51, at 220.
- 88 BIEDERMAN, *supra* note 4, at 529-30.
- 89 BASKERVILLE, *supra* note 12, at 70.
- 90 Daniels, *supra* note 11.
- 91 Interview with Travis Hill, music publisher, in Nashville, Tenn. (Feb. 9, 1999).
- 92 Telephone Interview with Jim Harris, entertainment attorney (Feb. 5, 1999).
- 93 Harris, *supra* note 92; Milom, *supra* note 10.
- 94 *Id.*
- 95 Harris, *supra* note 92.
- 96 Biederman, *supra* note 25.
- 97 Doyle, *supra* note 23.
- 98 Daniels, *supra* note 11.
- 99 Doyle, *supra* note 23.
- 100 Wood, *supra* note 1.
- 101 Mimms, *supra* note 78.

APPENDIX A: GRANT OF & TRANSFER OF RIGHTS IN THE SONG

Grant of Rights.

(a) Writer hereby irrevocably grants, sells, assigns, transfers, sets over and delivers exclusively to Publisher and its successors and assigns Writer's interest in those musical compositions set forth on Schedule A hereto and those musical compositions and works which may hereafter, during the term hereof, be written, composed or created by Writer, in whole or in part, including the titles, words and music thereto (such musical compositions and works being referred to herein individually as a "Composition" and collectively as the "Compositions"). The foregoing assignment, transfer and sale of the Compositions includes, but is not limited to, the following: the exclusive rights in and to all copyrights therein for the universe, and all rights, claims and demands in any way relating thereto; the exclusive right to secure said copyrights throughout the entire universe and to have and to hold said copyrights for the full term of said copyrights; the exclusive right to secure and hold any renewals or extensions of said copyrights; the exclusive right to have and to hold all rights of any nature whatsoever now and hereafter existing or existing under any agreement or license thereto, or existing under any law now in existence or which may come into existence under legislation hereafter enacted. All of the rights granted shall exist for and during the full terms, U.S. and international, of all such copyrights, including any renewals or extensions thereof

(b) Without limiting the generality of the foregoing, Writer hereby acknowledges and agrees that the rights and interests assigned, transferred and sold as set forth hereinabove shall include, without limitation, Writer's irrevocable grant to Publisher, its successors and assigns, of the sole and exclusive right, title, license, privilege, and authority throughout the entire universe with respect to all of the Compositions, as follows:

(i) To perform and license others to perform the Compositions publicly or privately, for profit or otherwise, by means of public performance, radio broadcast, television, or any and all other means of media, whether now known or hereafter conceived or developed;

(ii) To substitute a new title or titles for the Compositions or any of them and to make any arrangement, adaptation, translation, dramatization or transposition of any or all of the Compositions or of the titles, lyrics or music thereof, in whole or in part, and in connection with any other Compositions or outside compositions or new music to the lyrics, or new lyrics to the music, of any Compositions, all as Publisher may deem necessary or desirable in its best business judgment, it being understood and agreed that any change in the title, lyrics or music, or any dramatization of any or all of the Compositions will be subject to Writer's prior approval which approval will not be unreasonably withheld;

(iii) To secure copyright registration and protection of the Compositions in Publisher's name or otherwise, as Publisher may desire, at Publisher's own cost and expense, and at Publisher's election, including any and all renewals and extensions of copyright under any present or future laws throughout the world, and to have and to hold said copyrights, renewals and extensions and all rights existing thereunder, for and during the full term of all said copyrights and all renewals and extensions thereof;

(iv) To make, or cause to be made, and to license others to make, master recordings, transcriptions, soundtracks, pressings and any other mechanical, electrical or other reproductions of the Compositions, in whole or in part, in such form or manner and as frequently as Publisher shall determine, including without limitation the right to synchronize the Compositions with sound motion pictures, and to use, manufacture, advertise, license or sell any such reproductions for any and all purposes, including without limitation private and public performances, radio, phonograph records and any and all other means or devices, whether now known or hereafter conceived or developed. Notwithstanding the foregoing, any license of a Composition(s) in connection with the following usages will require the Writer's prior approval, which approval will not be unreasonably withheld: commercials, films with an MPAA rating of NC-17, any film opening or end-credit use, first-use mechanical license at less than 75% of the statutory rate, any so-called "merchandising" use, any exclusive license for a term of more than (3) three years and any usage in connection with political or religious causes. In the event the writer enters into an agreement for his services as a recording artist with a record company whose product is distributed by one of the major U.S. distribution companies, Publisher agrees to issue licenses in compliance with the controlled compositions' clauses in such agreement.

(v) To print, publish and sell, and to license others to print, publish and sell, sheet music, Orchestrations, arrangements and other editions of the compositions in all forms, including without limitation the inclusion of any or all of the Compositions in song folios, compilations, song books, mixed folios, Writer's personality folios and lyric magazines with or without music.

(vi) Any and all other rights now or hereafter existing in all Compositions under and by virtue of any common law rights and all copyrights and renewals and extensions thereof, including without limitation the grand rights and so-called small performance rights.

APPENDIX B: EXPLOITATION BY PUBLISHER

Publisher agrees to use its reasonable business endeavors to commercially exploit the Compositions.

APPENDIX C: PUBLIC PERFORMANCE ROYALTIES

Royalties Payable to Writer.

...Writer shall receive his public performance royalties throughout the world directly from the performing rights society with which he is affiliated, and shall have no claim whatsoever against Publisher for any royalties received by Publisher from any performing rights society which makes payment directly (or indirectly other than through Publisher) to writers, authors, and composers

APPENDIX D: MECHANICAL ROYALTIES

Royalties Payable to Writer.

Publisher agrees to pay to Writer royalties as provided below. The sums set forth below, whichever are applicable, represent Publisher's entire obligation to pay Writer for the publication and exploitation by Publisher of the Compositions, including title, words and music:

(a) Fifty percent (50%) of any and all net sums actually received by Publisher in the United States from the exploitation in the United States and Canada by licensees of mechanical reproduction rights, grand rights, electrical transcription and reproduction rights, motion picture and television synchronization rights, dramatization rights and all other rights therein

APPENDIX E: ASSIGNMENT OF RIGHTS

Assignment.

Publisher shall have the *right to assign this agreement* and any of its rights hereunder *to a parent, subsidiary or affiliate or purchaser of all or substantially all of its assets*. *Writer may not assign this Agreement or any of its rights hereunder (except Writer's right to receive royalties) nor delegate his duties hereunder.* In all other respects, this Agreement shall be binding upon the parties hereto and their respective successors in interest, heirs, legatees, executors, administrators, legal representatives and assigns.